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WASHINGTON, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules Regarding Installment Payment
Financing For Personal Communications
Services (PCS) Licensees

WT Docket No. 97-82

PETITION FOR RECONSIDERATION

Windkeeper Communications, through counsel and pursuant to FCC Rule Section 1.106, seeks reconsideration of the Commission's Order on Reconsideration of the Second Report and Order in the above captioned proceeding¹. In its Reconsideration Decision, the FCC modified certain aspects of its original C block restructuring decision,² including its policy governing the disposition of down payments for licenses that are returned to the FCC under the amnesty option. As discussed below, the revised down payment relief

¹Amendment of the Commission's rules Regarding Installment Payment Financing For personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, released March 27, 1998 (hereinafter "Reconsideration Decision")

²See Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997) (hereinafter "Second Report and Order").

that the Commission generally made available under the amnesty option does not extend equitably to all licensees that pursue that option, namely to single license entities.

In particular, entities (typically smaller) such as Windkeeper, that obtained only one C block license have no choice but to forfeit their entire down payment to the FCC if they elect amnesty, even if they do not intend to participate in a reauction for the returned license. On the other hand, other licensees (typically larger entities) with multiple licenses now have the option of applying 70 percent of their down payment for returned licenses toward the prepayment of licenses that they intend to keep. As explained below, the FCC should rectify this inequity by providing that any C block licensee holding a single C block license will receive a credit of 70 percent of its down payment for the returned license which can be used in a future FCC auction other than the reauction of the returned license.

I. Background.

A. Windkeeper Communications.

Windkeeper is a small woman owned and controlled business that is the C block licensee for the United States Virgin Islands. The Company's sole shareholder is Ms. Zoé Hazen, an entrepreneur with extensive experience in the cable television business. Ms. Hazen formed Windkeeper in 1994 to build a new PCS business in response to Congress' direction that the FCC design its auction rules flexibly to "ensure that small businesses . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . ." 47 U.S.C. §309(j)(4)(D).

Ms. Hazen, like a number of other true entrepreneurs, devoted more than two years and substantial personal resources, even before the auction started, pursuing this dream while battling numerous delays and other legal setbacks³, which ultimately left the C block auction vulnerable to the numerous abuses and distortions that have brought us here today. Windkeeper's initial goal was to build a national PCS network, however, the evolution of the Commission's liberal attribution rules, which allowed massive foreign and domestic companies to masquerade as "small businesses", together with the fallout of the Adarand decision, ultimately forced Windkeeper to focus its sights on a single market. As noted above, Windkeeper emerged from the auction as the winner of the U.S. Virgin Islands at a net price of \$7,797,750.

As the history of this proceeding has documented, the C block auction was dominated by rogue companies that exploited or ignored the FCC rules intended to provide opportunities to true small business.⁴ The financial implosion of the largest C block winners has dragged the smallest, most financially vulnerable companies, like Windkeeper, down in their wake, like the lifeboats unfortunate enough to be in the vicinity of the Titanic when it finally dropped below the waves. Financing sources have dried up, or remained uncommitted,

³Ultimately, the Supreme Court's Adarand decision stripped away the minimal advantage that woman and minority owned businesses had managed to obtain in the FCC's auction rules. Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995).

⁴The numerous legal controversies involving NextWave, PCS 2000, GWI and Pocket, to name a few, are well known to the Commission and will not be repeated here.

as the speculation concerning the prospects of the dominant C block entities and the valuation of C block licenses has continued unabated.⁵

Windkeeper is still pursuing every possible lead in an effort to implement its business plan for the Virgin Islands. However, in considering its options, it now discovers that, in addition to the burdens that it has already encountered, largely as a direct consequence of the actions of the large bidders in the C block auction, if it elects amnesty, it now stands to lose its entire down payment (\$779,775), while larger bidders with multiple licenses will be entitled to apply 70% of their down payments for returned licenses to the prepayment of licenses they elect to keep.

B. The C Block Restructuring Decision.

In its Second Report and Order, the Commission recognized that the C block auction had gone terribly awry and created a menu of four options for licensees to choose from to ameliorate the financial problems that confronted many licensees.⁶ The Commission's options reflected the need to balance certain policy objectives including preserving the integrity of the auction process and rapidly deploying new technologies.⁷ In addition, as

⁵Investors are sitting on the sidelines for several reasons, all related to the belief that the C block licenses are grossly overvalued and will go for a fraction of the current price at reauction. Contributing to this atmosphere have been auctions subsequent to the C block that generated far lower license prices. Specifically, the low prices in the D, E and F block, the WCS and the LMDS auctions have created a rationale expectation that C block licenses will be acquired far more inexpensively in the reauction. The recent bankruptcy decision involving GWI, which revalued its license at a fraction of the debt owed to the FCC, has provided tangible validation to this expectation.

⁶The options are (1) resumption of payments, (2) prepayment, (3) amnesty and (4) disaggregation.

⁷Second Report and Order, 12 FCC Rcd. at 16,437-38.

acknowledged in the Reconsideration Decision, the Commission believed it was "essential to ensure fair and impartial treatment for all auction participants, **including winning bidders**, unsuccessful bidders, and licensees in competing services".⁸

With respect to the amnesty option, the Second Report and Order initially provided that each licensee selecting this option would be required to return all its licenses to the Commission in return for relief from its outstanding debt, but would forfeit its entire down payment.⁹ Licensees electing amnesty were permitted to participate in any reauction of the returned licenses.

On reconsideration, the Commission determined that the all or nothing approach initially adopted was too inflexible and revised the policy to allow licensees to choose amnesty on an MTA by MTA basis. Licensees are now given two choices:

(1) receive no credit for its down payment(s) but remain eligible to bid on the reauction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the reauction eligibility to reacquire the licenses it surrendered pursuant to this option through either reauction or any other secondary market transaction (amnesty/prepayment).¹⁰

This added flexibility does not benefit the smallest of C block licensees, those with only a single license.

⁸See Reconsideration Decision at ¶4 (Emphasis added); Second Report and Order, 12 FCC Rcd. at 16437-38.

⁹Second Report and Order, 12 FCC Rcd. at 16,462-64. A limited exception was created for builtout markets.

¹⁰Reconsideration Decision at ¶37.

II. Legal Argument.

Windkeeper recognizes that the Commission has previously considered and rejected a number of proposals that would have returned all or some portion of a licensee's down payment upon the return of its licenses.¹¹ Similarly, the concept of providing a "store credit" to be used in the reacquisition of returned spectrum has been rejected.¹² However, the Commission's rejection of such proposals has up to now been applied evenhandedly across the board with respect to all licensees electing amnesty. Moreover, in light of the recent revisions to the amnesty rule, the Commission has never considered the unique hardship now limited to single license entities and the merit of providing a credit for future auctions, other than for the returned license.

As noted previously, the Reconsideration Decision relaxes the original requirement that down payments be forfeited by allowing 70 percent of such deposits to be applied toward the prepayment of licenses in another MTA. By providing this relief the Commission has departed from one of the basic principles guiding it in the restructuring process--ensuring fair and impartial treatment for all auction participants, **including winning bidders**, unsuccessful bidders, and licensees in competing services. Now C block licensees with licenses in numerous MTAs, ironically larger bidders such as the rogue bidders that have been the principle cause of the C block problems, have been given an additional option that the smallest of bidders, those with only a single license, have been denied. Such single

¹¹See Second Report and Order, 12 FCC Rcd. at 16,459-50; Reconsideration Decision at ¶36 note 79.

¹²Id.

license entities selecting amnesty do not have any other licenses to apply a credit to and, therefore, simply are required to forfeit their down payments.

The Commission can rectify this inequity, and at the same time promote the ability of small entrepreneurs to participate in a future spectrum auction (consistent with Congress' intent to promote the participation of designated entities in telecommunications industry), by providing an additional choice for those electing amnesty. Specifically, the Commission should allow single license C block entities that elect amnesty and that do not wish to rebid on the returned license in a reauction, to receive a credit of 70 percent of their down payment for use in a future spectrum auction of their choice. If the company does not participate in such future auctions within a reasonable period of time (Windkeeper suggests five years) then the credit would be eliminated.

This approach, while reestablishing some evenhandedness into the manner in which different C block licensees are treated, would not undermine the integrity of the auction process as the licensee electing this approach would not be rebidding for the spectrum it returns. Moreover, the forfeiture of 30 percent of the down payment, in Windkeeper's case \$233,932.50, amounts to a substantial penalty for a small company, and is ample consideration to the Commission (when compared to larger C block winners) for the relief accorded by the FCC through amnesty. On the other hand, this modest relief will maintain at least some chance that Congress' intention of promoting the involvement of small businesses, in this case woman owned, to take part in the expanding telecommunications marketplace.

III. Conclusion.

The Commission should revise its Reconsideration Decision to limit the penalty on the smallest of C block licensees that elect the amnesty option and give up the right to rebid on returned spectrum. By allowing single license C block licensees to receive a credit for future auctions as described above, the Commission would be remedying the imbalance favoring larger licensees that was adopted in the Reconsideration Decision. Such an approach would not undermine any Commission policies regarding the auction process and would promote the involvement of small businesses, including women owned companies, as intended by Congress.

Respectfully submitted,

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